

Nguyen (Migration) [2018] AATA 1391 (5 April 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Thi Kim Loan Nguyen

CASE NUMBER: 1620727

DIBP REFERENCE(S): BCC2016/1841947

MEMBER: Adrienne Millbank

DATE: 5 April 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 05 April 2018 at 5:11pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Genuine spousal relationship – Marriage certificate – Bogus document – Absence of financial pooling – Knowledge of financial situation – Residential arrangements – Fatherly devotion to child – Unlawful non-citizen

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2 cls 820.211, 820.221, Schedule 3 Criterion 3001

CASES

MZYPZ v MIAC [2012] FCA 478

Babicci v MIMIA (2005) 141 FCR 285

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 17 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 25 May 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The Delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) and 820.211(2)(d). The Delegate was not satisfied, on the information and evidence provided, that the applicant and sponsor were in a genuine spousal relationship. The applicant was an unlawful non-citizen for a total period of four months and eighteen days. The Delegate found that there were no compelling reasons to waive the Schedule 3 criteria. On the basis of her migration history and circumstances (summarised and discussed below), the Delegate concluded that the applicant was using the Partner visa as a pathway to permanent residence.
4. On 1 February 2018 the Tribunal wrote to the applicant, through her representative, inviting her to attend a hearing on 1 March 2018. On 1 February 2018 the Tribunal received a request that the hearing be postponed. The Tribunal agreed to this request and rescheduled the hearing.
5. The applicant appeared before the Tribunal on 22 March 2018 to give evidence and present arguments. The sponsor did not attend the hearing in person, but indicated, through the applicant, that he was prepared to answer questions over the phone. The Tribunal obtained oral evidence from the sponsor over the phone, during the hearing.
6. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
7. The applicant was represented in relation to the review by her registered migration agent, who attended the hearing.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The applicant was born in Vietnam in 1990. She first arrived in Australia on 20 March 2012 on a Student (subclass 573) visa. At hearing she stated that she was enrolled to study accountancy when she arrived, but that she completed only one year of English language tuition.
10. On 19 March 2014 the applicant applied for a Skilled Independent (subclass 189) permanent resident visa, which was granted on 24 March 2014. On 19 December 2014 this visa was cancelled, after documents provided in support of the application were found to be bogus.
11. The applicant was unlawful from 24 June–2 July 2015.

12. On 1 July 2015 the applicant applied to the then Migration Review Tribunal for a review of the decision to cancel her Skilled Independent (subclass 189) permanent resident visa. The MRT confirmed the decision on 23 December 2015. During the review, the applicant testified that she paid a third party the sum of \$65,000, and permitted an application to be lodged on her behalf, using incorrect information.
13. On 20 January 2016 the applicant's Bridging E visa ceased, and from 21 January–29 May 2016 she was unlawfully in the country: a period of four months and nine days.
14. The sponsor was born in Vietnam in 1985, and arrived in Australia as a sponsored family member at the age of 13. He declared no previous relationships. He is employed as a machine operator in a steel sheet fabrication business.
15. The parties claimed that they have known each other since December 2014, but that they only realised that they had feelings for each other on 23 December 2015, when it seemed that the applicant might have to leave the country. The applicant lodged the Partner visa application on 25 May 2016, and on 30 May 2016 she was granted a Bridging E visa in association with this visa application.
16. On 16 September 2016 the Department wrote to the applicant inviting her response to information provided to it that her relationship with the sponsor was contrived; that the sponsor had been paid or promised the sum of \$80,000 in order to enter into a marriage with her; and that she was, at the time of application, residing in a de facto relationship with a different person, to whom she was pregnant.
17. The applicant denied that the sponsor was paid \$80,000 to enter into a fake marriage with her, but acknowledged that she was pregnant with a different person's child.
18. The applicant has been on Bridging E visas, without work rights, since the cancellation of her Skilled Independent (subclass 189) permanent resident visa.
19. The applicant provided to the Tribunal a copy of a Queensland birth certificate, for her daughter born on 13 February 2017, in which the sponsor is named as child's father.
20. The issues in the present case are whether the applicant was in a genuine spousal relationship at the time of application and this decision, and, if so, whether there are compelling reasons to waive the Schedule 3 criteria.
21. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
22. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

23. A copy of the parties' Queensland Marriage Certificate was provided, certifying that the parties married on 10 April 2016 and registered the marriage in Brisbane. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

Financial aspects of the relationship

24. At the time of application, the applicant provided a copy of a bank transaction statement, showing that the parties had opened a joint bank account, with a cash deposit of \$500. No further transactions were shown, and the delegate gave this statement no weight as evidence of shared finances. To the Tribunal, the applicant provided statements of transactions from August–December 2017. These show fortnightly deposits of the sponsor's salary, followed by cash withdrawals and transfers, and a few individual-type purchases, including for petrol. At hearing the applicant stated that she and the sponsor used cash for their food and grocery shopping; indeed, for all of their shopping.
25. The applicant confirmed that the parties have made no significant household purchases together, and that they have no joint assets or joint loans. She stated that as she has had no work rights, she and her daughter were financially dependent on the sponsor, and that he gave her cash for household and personal shopping. She acknowledged that she still helped her cousin, whose shop she worked in previously, but claimed that she only helped her cousin with housework and child-minding, and not as a paid employee.
26. The sponsor, when asked about the parties' finances, claimed that he was supporting the applicant and her child financially. He expressed a degree of anger and resentment at this state of affairs, arguing that the applicant's lack of work rights had placed unfair pressure on him. He argued that he had financial commitments of his own, including a mortgage of \$400,000 on a farm, out of Melbourne, that he was purchasing with his step-father, and that his finances and endurance were stretched to the limit. He stated that the applicant had presented 'the paper' (a copy of the applicant's daughter's birth certificate, in which he is identified as the father) to government agencies, but that she has been unable, as yet, to obtain any sort of benefits or support for herself or her daughter, because of her residence status.
27. The Tribunal asked the applicant about the source of the \$65,000 she paid for bogus documents. She stated that her parents had mortgaged their home in Vietnam; that they were struggling to pay the interest on this loan; and that she owed still owed them the money. She stated that the mortgage was a sizeable financial imposition on her parents; that they could not raise any more money; and the claim that the sponsor was paid \$80,000 to marry her, was therefore baseless. When the Tribunal asked how the parties juggled repayments to her parents and the sponsor's payment of his mortgage on his farm, she stated that she was not, at the time of decision, repaying her parents; that what the sponsor did with his own money was his business; and that she and her parents were grateful to the sponsor because he was supporting her and her daughter.
28. The parties confirmed at hearing that the farm that the sponsor is purchasing in Melbourne is in his name and the name of his step-father, and that when the sponsor purchased a new car in 2017, he registered it in his name only. The applicant stated at hearing that the sponsor 'lets her drive his car'.
29. The sponsor, when asked about the applicant's debt to her parents, stated that he knew nothing about any debt or money borrowed by the applicant from her parents. He

conjectured that if she owed money to her parents, this would have been from when they funded her Student visa application.

30. The Tribunal accepts that there have been more transactions in the parties' joint bank account since the delegate's decision. The Tribunal accepts that the sponsor at the time of decision is supporting the applicant and her daughter financially, but notes his expressed resentment of what he sees as a temporary situation. Given the absence of other evidence of financial pooling and sharing, and the parties' professed lack of interest and involvement in each other's financial circumstances, including the purchase of property and cars, and a significant debt, the Tribunal is not satisfied that the parties have pooled their financial resources commensurate with being in a genuine spousal relationship.

Nature of the household

31. At the time of application and decision, the applicant was living in a house rented from her cousin, and which she shared with this cousin's daughter. She claimed that at the time of application the sponsor spent weekends there.
32. At the hearing the sponsor stated that he had rented a room in a shared house near his place of work, in Crestmead, a 30-minute drive from where the applicant lived. He stated that he moved into the applicant's rented house 'full-time' in July 2017, and that at the time of decision the cousin's daughter had moved out, so the house was occupied only by the parties and the applicant's daughter.
33. Copies of mail and utilities bills, from 2016 and 2017, were provided, addressed to the parties at the same residential address. A copy of a joint tenancy agreement, signed by the applicant's cousin, as landlord, and a receipt for a bond lodgement, for the sum of \$360, in both of the parties' names, were also provided.
34. The applicant stated at hearing that she did all the housework and cooking, because the sponsor worked. The sponsor stated that he worked long hours, and that the sponsor did the housework. When asked specifically whether he shared in the care of the applicant's daughter (as statutory declarants had described him as a doting father who liked to change nappies), he stated that he did not; he stated that the applicant was responsible for the child-minding.
35. The Tribunal accepts that the parties used the same residential mailing address during 2016. The Tribunal accepts further that the sponsor moved in 'full-time' with the applicant and her daughter in July 2017. This is fifteen months after the parties registered their marriage; eight months after the time of application; and five months before the time of decision. The Tribunal accepts that the parties have lived in the same house since July 2017, but in the absence of convincing evidence that the applicant and the sponsor have established a joint household where they have lived together as a spousal couple, and shared responsibility for children, the Tribunal is of the view that the parties' residential arrangements were contrived for the purpose of the visa application.

Social aspects of the relationship

36. Photos were provided of the parties at their wedding, and eating with friends. At hearing the parties confirmed that the only family member who attended the wedding was the applicant's cousin's daughter, who was a witness. At hearing the sponsor stated that he visited Vietnam in 2017, for the purpose of attending a friend's wedding, and that during this trip he visited the applicant's parents. He advised that while he was busy at work, an occasion such as a friend's wedding was unmissable. He stated however, and confirmed, that his friends and family members, including his mother, who live in Melbourne, were too busy to attend

his own wedding. The applicant stated that her family in Vietnam couldn't afford to attend her wedding.

37. The sponsor confirmed that he made trips to Vietnam in 2016 and 2017; that during his 2017 visit he spent several days with the applicant's parents; and that he met also some siblings and other family members.
38. Statutory declarations were provided at the time of application from: the applicant's cousin, stating the relationship was genuine because the parties had known each other since December 2014; the applicant's parents stating that they were grateful to the sponsor and happy with the union; and the sponsor's mother, stating that she had spoken to the applicant over the phone, and was happy that the parties were expecting a child together. The Tribunal places little weight on these declarations: because the parties themselves declared they did not enter into a relationship until December 2015; because the applicants' parents had not met the sponsor; because the sponsor's mother and step-father had not met the applicant; and because the parties were not in fact expecting a child together. The Tribunal further notes that all these declarations were signed by parties interested in the applicant obtaining a permanent visa;
39. Further statutory declarations were provided to the Tribunal: from a customer at the applicant's cousin's butcher shop, stating that he had observed the sponsor to relish his role as father and provide 'tender care' for the applicant's baby; from the cousin of the applicant, stating that she had observed how caring the sponsor is as a father, doing the washing and changing nappies; and from a friend of the sponsor, stating that the sponsor was working hard to provide for the applicant and her daughter, had 'bonded as a father', and provided 'loving care' for the child.
40. The Tribunal accepts that, while sharing a house with the applicant, the sponsor would have provided some attention to the baby, but, in light of the sponsor's own testimony at hearing that the applicant looked after her child, and that he did not, does not find these testimonials regarding his fatherly devotion convincing, and gives them little weight. The Tribunal is of the view that these declarations, of similar length and with similar content, were contrived for the purpose of the visa application, specifically in order to claim compelling circumstances for a waiver of the Schedule 3 criteria.
41. At hearing the parties confirmed that they have not, as a couple, joined any organisations or clubs. Apart from the photos showing the parties eating with friends or family members, no evidence was provided that the parties have organised or participated in social occasions as a couple. The applicant stated that in terms of social activities, she and the sponsor attended parties at her cousin's place, but that they mainly stayed home, because of the baby.
42. The Tribunal accepts that at the time of decision the sponsor has met the applicant's parents, and that family members of the applicant and the sponsor support the applicant obtaining a Partner visa. On the evidence provided, however, the Tribunal is not satisfied that the parties have been recognised and related to by family members or within the wider community as a couple in a genuine spousal relationship.

Nature of persons' commitment to each other

43. The applicant provided evidence that the parties have obtained health insurance as a couple, and that they have written wills stipulating the other as beneficiary. The applicant at hearing confirmed that she has no assets to bequeath. The parties' representative argued that the wills should be viewed as expressions of the parties' future intentions, rather than present commitment, to each other. The Tribunal notes that wills can be changed.

44. As noted, the applicant was in a relationship with another person in 2016, and the parties claimed they realised they had feelings for each other only after the applicant had exhausted other options to remain in the country. The Tribunal acknowledges that the applicant has denied information provided to the Department that the sponsor was paid the sum of \$80,000 to enter into a contrived marriage with her. The applicant has however testified that she borrowed the sum of \$65,000 from her parents, for bogus documents, in order to obtain a Skilled Independent (subclass 189) visa; that her parents had to mortgage their house to provide her with this money; that they were struggling with the interest repayments; and that she had not been able to start repaying them because she has not had work rights.
45. As noted above, the sponsor declared at hearing that he knew nothing about this loan from the applicant's parents. The Tribunal asked the applicant why she would not have informed her husband about it, and why she didn't discuss this sensitive issue with the sponsor prior to his visit to Vietnam, and her parents, in 2017. The applicant stated that the sponsor's visit was a happy family occasion, where only happy family matters were discussed. She then claimed that she had in fact informed the sponsor about the payment for the bogus documents and her debt to her parents, but that he must have forgotten about it.
46. The Tribunal finds it implausible that the applicant, if in a genuine spousal relationship, would not have shared with her husband the details of such a significant migration, financial and family disaster; that the sponsor would have forgotten about it; and, if the applicant's story about borrowing the money from her parents who could ill-afford it is correct, that this would not have been an issue of concerned discussion between the parties prior to the sponsor's visit to the applicant's parents in 2017.
47. The applicant at hearing claimed that she and the sponsor are in a long-term relationship. The applicant claimed to have entered into a relationship with the sponsor at the end of December 2015. The Tribunal does not accept that a relationship of four months, to the time of application, is a long-term relationship. The Tribunal accepts that the sponsor has lived 'full-time' in the same house as the applicant since July 2017, but does not accept that a full-time live-in relationship of eight months, to the time of decision, is a long-term relationship. In any event, the Tribunal does not consider the parties were in a genuine spousal relationship at the time of application or decision.
48. The Tribunal accepts that the applicant and her parents are grateful to the sponsor for his support in relation to the visa application. The Tribunal is not satisfied, on the evidence provided, that the parties have shared important information about themselves, and provided companionship and emotional support to each other commensurate with being in a genuine spousal relationship, and that they see the relationship as long-term.
49. Having considered r.1.15A(3) matters the Tribunal finds, against s.5F(2)(b)-(d), that the parties do not have a mutual commitment to a shared life to the exclusion of others; and that they are not in genuine and continuing relationship.
50. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made or the time of this decision.
51. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221.
52. Alternative criteria in cl.820.211(7), 820.211(8), 820.211(9), 820.221(2), 820.221(3) (death, family violence, child exceptions) are not relevant to the applicant's circumstances, and she has made no claims against these criteria.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

53. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
54. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

55. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
56. As noted above, the applicant has remained in Australia since 21 January 2016 unlawfully, or on Bridging E visas.
57. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

58. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
59. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
60. The applicant claimed as her compelling reason to waive the Schedule 3 criteria the fact that she has a child. As noted, the sponsor is named as the child's father on the child's birth certificate. When the Tribunal asked the sponsor whether he has applied, or has any intention, of adopting the applicant's child, he stated that he has not and did not. The parties' representative argued that the applicant is in the process of claiming Australian citizenship for her child. The Tribunal makes no comment on the legality of the applicant's actions, but notes that she stated that while the child's biological father, who was in Australia on a Student visa, knew she was pregnant, he has since returned to Vietnam. He is therefore unlikely to know that the sponsor is named on his daughter's birth certificate as her father.
61. Naming the sponsor as the father of the child on a birth certificate does not make the applicant's child a child of the relationship. The Tribunal does not find the fact that the applicant has a child, from another relationship, to be a compelling reason to waive the Schedule 3 criteria.

62. The sponsor claimed as a compelling reason, as noted, that he was tired, and near the end of his tether, from being the sole provider, as he claimed, for the applicant and her child. He stated that he works hard; that he is an Australian citizen; and that he needs the applicant to remain in the country to cook and clean for him. He stated, as noted above, that he needs the applicant to be granted a permanent visa and work rights, and for her child to be recognised as a citizen, so that the applicant and her child could access government services and benefits, and relieve his load.
63. The sponsor stated, in response to questions at hearing, that he couldn't accompany the applicant to Vietnam, or even visit her there, during the time it would take to process a Partner visa lodged in that country, because of his work commitments. The Tribunal notes that the sponsor visited Vietnam in 2016 and 2017, and does not accept that he would not be able to visit the applicant and her daughter during the processing of her Partner visa application. The Tribunal further finds that the sponsor could maintain communication with the applicant over the phone, or via the internet, during her absence. For these reasons, the Tribunal does not accept that the suffering the sponsor claims would be caused to him through separation from the applicant and her daughter, during a period of visa processing, is a compelling reason to waive the criteria.
64. As noted, the applicant claimed further that she has been in a long-term relationship with the sponsor. The Tribunal notes that the sponsor stated at hearing that he has lived 'full-time' with the applicant and her child only since July 2017. As discussed above, the Tribunal is not satisfied that the parties were in a genuine relationship at the time of application or the time of this decision. The Tribunal therefore does not find the applicant's argument that the parties have been in a long-term relationship to be compelling.
65. The parties' representative submitted that it was unfair to ask the parties what compelling reasons there might be for waiving the criteria, because the applicant's English was poor, and neither of the parties were familiar with the legal requirements. She submitted that despite the firmness and confidence with which the sponsor stated that his compelling reason was that he needed the sponsor to cook and clean for him, the compelling reason to waive the criteria was in fact that the applicant has child, born in Australia, and whom the sponsor, an Australian citizen, was prepared to accept as his own. The Tribunal explained the relevance of the criteria at the hearing; does not accept that the parties were unable to comprehend the questions; and does not accept that the applicant has a child born in this country, is a compelling reason to waive the criteria. Giving birth to a child in Australia does not confer resident rights on the child, if the child's parents are not permanent residents or citizens.
66. Having considered the evidence, arguments, circumstances and migration history of the applicant, the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
67. As noted above, alternative criteria in cl.820.211(3) – (9) (people entering Australia to marry and who have subsequently married, and death, family violence, child exceptions) are not relevant to the applicant's circumstances and she has lodged no claims against these criteria.
68. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.
- 69.

DECISION

70. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.